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No. 15665

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN A. MERZ and CHARLES L. BRAY, doing business as All-Jersey Dairy,

Appellants,

vs.

SUNNYBROOK FARMS MILK AND ICE CREAM CO., INC., a corporation and POLAR PIE ICE CREAM CORPORATION,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANTS' BRIEF

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS OF JURISDICTION OF DISTRICT COURT AND THIS COURT

Facts and Pleadings Relating to Jurisdiction of District Court

The District Court had jurisdiction under Title 28, Section 1332, U.S.C.

This case was commenced by the Plaintiffs who were residents of the State of Washington against the

Defendants which were corporations existing under the laws of the State of Oregon, therefore there is a diversity of citizenship. The amount involved exceeds the sum of $3,000.00. The pre-trial order (R. I 15) supersedes the pleadings and sets forth the jurisdictional facts (R. I 16).

Facts Relating to Jurisdiction of This Court

This court has jurisdiction to review the judgment under Title 28, Sections 1291 and 1294, U.S.C.

The cause was tried to the court below and upon conclusion thereof a final decision in the form of a judgment against the Plaintiffs and in favor of the Defendants was entered (R. I 45).

STATEMENT OF THE CASE

As indicated by the pre-trial order (R. I 15-33), this is an action for damages for breach of contract for negligence and for fraudulent misrepresentation. Only the matters relating to the alleged breaches of contract are presented upon this appeal.

Plaintiffs were milk distributors in Cowlitz County, Washington (R. I 16, R. II 21, 33). Defendants were milk processors in Portland, Oregon (R. I 16, R. II 209). After a period of dealing for some 11 months whereby Defendants furnished Plaintiffs with their requirements without a contract (R. II 25), the parties entered into a written contract on June 11, 1954, whereby for a term of three years Defendants would furnish Plaintiffs with their requirements and Plaintiffs would

buy all of their requirements from Defendants (R. I 5-8, 17). Defendants also undertook to provide Plaintiffs with milk containers (R. I 8, 17).

Plaintiffs had started their business as All-Jersey Dairy on July 15, 1953 (R. II 21). In so doing they invested or became obligated in the sum of $14,000 for physical assets (R. II 24), an All-Jersey franchise from the Washington Jersey Cattle Club (R. II 23, 24) and incidentals.

During the period of deliveries to Plaintiffs by Defendants, a county ordinance of Cowlitz County required milk to contain a minimum butterfat of 3.6% (R. II 84). The standards for the State of Washington required 3.25% until August, 1955, when they were raised to 3.5% (R. II 90). Requirements of the State of Oregon were 3.8% until November 6, 1954, when Oregon's Milk Control Act was repealed and thereafter no specified minimum was required (R. II 269). The pricing provisions of the contract between Plaintiffs and Defendants were based upon 3.8% butterfat content (R. II 29).

After the contract was entered into, Plaintiffs commenced to receive complaints from the Cowlitz County milk authorities concerning low butterfat content and impurities in the milk (R. II 44, 86; Pl. Ex. 6-A). The Defendants were advised of these complaints (R. II 45) and acknowledged them (R. II 266). Cowlitz County tests showed butterfat content of 3.9% in September of 1953 (R. II 63; Pl. Ex. 6-D, 16). It declined to 3.6% in March, 1954 (R. II 63; Pl. Ex. 6-D, 16) and by December, 1954, ran as low as 3.3% and 3.4% (R. II 63;

Pl. Ex. 6-D, 16). In January, 1955, tests were running down to 3.0% and 3.1% (R. II 63; Pl. Ex. 6-D, 16). One sample in April, 1955, showed 3.2% (R. II 82-83; Pl. Ex. 6-D, 16). Others later that month showed 3.3% 3.4% and 3.25% (R. II 83-84; Pl. Ex. 6-D, 16). Defendants' own tests in Portland during the same period repeatedly showed less than 3.5% and this was true after August, 1955, when the Washington State requirements were raised to 3.5% (Def. Ex. 13). The cartons in which Defendants furnished milk to Plaintiffs for resale were labeled 3.8% butterfat until the supply was exhausted in April or May of 1955 (R. II 34). Thus, it should be undisputed that during early 1955 the milk in these cartons contained substantially less butterfat than was stated upon the label.

The testing by the Cowlitz County authorities culminated in the arrest and prosecution of Plaintiffs in Cowlitz County on April 28, 1955, for selling milk with a butterfat content less than that required by the county ordinance (R. II 17, 46, 85; Pl. Ex. 15-A). The charge was based upon the April 22, 1955, test of 3.2% butterfat (R. II 82-83). Upon the trial, the charge was dismissed because of the absence of any record of publication and a public hearing in the adoption of the ordinance (R. II 85). This was held to have rendered the ordinance invalid.

Plaintiffs' arrest and prosecution received substantial local publicity by newspaper and radio and came to the attention of Plaintiffs' customers (R. II 49, 171, 204; Pl. Ex. 2, 3, 4). Some of their retail customers noticed a decline in the quality of the milk before and after the

prosecution (R. II 166, 170, 176), and their wholesale customers testified to a definite decline in sales after the arrest (R. II 131, 139-40).

Plaintiffs attempted to continue in business but encountered increasing difficulty and were soon forced out of business entirely (R. II, 21, 128). Their sales which had previously shown a consistently increasing trend dropped off markedly (R. II 50; Pl. Ex. 1, 11). Upon liquidation of the business, Plaintiffs received $1,200 from Carnation Farms and some accounts receivable of doubtful value (R. II 24). After termination of the business, both Plaintiffs re-entered private employment (R. II 21, 106).

Upon hearing this evidence, the trial court rendered an oral opinion to the effect that Defendants had on occasion furnished milk of less than 3.5% butterfat and that Plaintiffs had sustained a loss of business as a result of the prosecution (R. I 46, 47, 48). The Court concluded that the Defendants were not liable for the results from the prosecution where the ordinance was invalid and held this to be the case even though Defendants knew the authorities intended to prosecute (R. I 47, 48). Accordingly, Plaintiffs were denied recovery.

The Defendants had counterclaimed for certain items, including carton costs, but waived their claims in the course of the trial (R. II 306). In the course of settling the findings, the Defendants, at the suggestion of the trial Judge, asked to be relieved of their waiver (R. II 306) and the judgment for Defendants includes the recovery of some portions of their claims (R. I 45).

This appeal is based upon the ground that the trial Court was in error in its basic conclusion that the prosecution was not the proximate result of specific breaches of contract by the Defendants.

SPECIFICATIONS OF ERROR

I.

The Court erred in finding that Defendants had performed their contract and in failing to find that Defendants had breached their contract by furnishing substandard and misbranded milk.

II.

The Court erred in finding that the prosecution of Plaintiffs and the resultant loss of business was not the proximate result of the breaches of contract by the Defendants and in failing to find to the contrary.

III.

The Court erred in failing to assess Plaintiffs' damages and in denying Plaintiffs' recovery for their damages.

IV.

The Court erred in entering judgment for Defendants on their counterclaims.

POINTS AND AUTHORITIES

Point I

A contract for the furnishing of food products for resale for human consumption includes implied warranties that such products are merchantable and fit for the

purpose intended, and will comply with the legal requirements in effect in the specified area of distribution as to quality, labeling, etc.

AUTHORITIES POINT I

Haynor Manufacturing Co. vs. Davis, 147 N.C. 267, 61 S.E. 54, 55 (1908).
Mazetti vs. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).
Lenz vs. Blake-McFall Co., 44 Or. 569, 573, 76 P. 356 (1904).
Stonebrink vs. Highland Motors, Inc., et al., 171 Or. 415, 425, 137 P.2d 986 (1943).
Oregon Revised Statutes, 75.150 (1) (2).
46 Am. Jur., Sales, p. 541, Sec. 355.

ARGUMENT POINT I

The contract entered into between the parties whereby the Defendants agreed to supply milk to the Plaintiffs for distribution in Cowlitz County, Washington, was one which would carry an implied warranty that the milk so furnished was of merchantable quality and fit for the use and purposes intended.

> ORS 75.150: "Implied warranties of quality. Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> "(1) Where the buyer, expressly or by implication, makes known to the seller that particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

> "(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

In Stonebrink vs. Highland Motors, Inc., et al., supra, that principle is stated as follows:

> "Under the sales act a dealer who sells articles which ordinarily are used in but one way impliedly warrants fitness for use in that particular way. . . . This is only a warranty of merchantability."

The Defendants admitted, their own evidence showed (R. Def. Ex. 13), and the Court found (R. I 46) that the Defendants supplied milk to the Plaintiffs which was below the requirements of an ordinance in Plaintiffs' immediate distribution area (R. II 84) and below the requirements of the State of Washington (R. II 90). This milk was furnished to the Plaintiffs in sealed cartons labeled as milk containing 3.8% butterfat (R. II 34), when in fact the milk in those cartons contained substantially less butterfat (R. II 63).

> "Where an article is bought for resale, it has been held that there is a warranty that it can be lawfully sold by the purchaser." (46 Am. Jur., Sales, p. 541, Sec. 355)

The case of Haynor Manufacturing Co. vs. Davis, supra, states the same principle in this manner—

> "Without reference to any authority in the agent to make an express warranty, the manufacturer, in selling through Guy" (the agent) "warranted against latent defects, that the article is merchantable, and can be lawfully sold by the purchaser, if bought for resale."

In Mazetti vs. Armour & Co., supra, the court said—

> "We would be disposed to hold on this question that, where sealed packages are put out, and it is made to appear that the fault, if any, is that of the manufacturer, the product was intended for the use of all of those who handled it in trade as well as those who consumed it. Our holding is that, in absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his good when dispensed in original packages, and that such a warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade."

The Defendants clearly breached the contract with the Plaintiffs by furnishing to them milk which was below the standards in Plaintiffs' distribution area in that it did not comply with the lawful requirements of Cowlitz County, Washington, and of the State of Washington, and in furnishing milk to the Plaintiffs which was mislabeled.

It is obvious that the Defendants were aware of the purpose to which Plaintiffs were going to put the milk and therefore the Defendants warranted that the product would be fit (Lenz v. Blake, supra).

The evidence introduced by the Plaintiffs shows clearly that much of the milk received by them from the Defendants was below the requirements of Plaintiffs' immediate distribution area (R. II 63) and below the State of Washington's requirements (R. II 90). Defendants admitted being in business in the State of Washington (R. II 214) and knowing of such requirements (R. II 86).

There is no conflict in the evidence upon these important matters, and the finding of the trial court that Defendants did not breach their contract is clearly erroneous as being contrary to the evidence.

Point II

Where acts or omissions occur in breach of a duty and criminal prosecution of the persons to whom the duty is owed may reasonably be expected to follow, such criminal prosecution, if it occurs, is the proximate result of the breach.

AUTHORITIES POINT II

Abounader vs. Strahmeyer & Arpe Co., 217 App. Div. 43, 215 N. Y. Supp. 702, affirmed 243 N.Y. 458, 154 N.E. 309 (1926).

Hopkins vs. Jamrog, Mass. 1931, 179 N.E. 224.

Friedgood vs. Kline, 123 N. Y. Supp. 247 (1910).

Lawton Refining Co. vs. Hollister, 86 Okla. 13, 205 P. 506 (1922).

Segal vs. Horwitz Bros., 32 Ohio App. 1, 167 N.E. 406 (1929).

Southwest Ice & Dairy Products Co. vs. Faulkenberry, Okla. 1950, 220 P.2d 257, 17 ALR 2d 1373.

Swain vs. Schieffelin, 134 N.Y. 471, 31 N.E. 1025 (1892).

Rossano vs. Kaminsky, 134 N. Y. Supp. 895 (1912).

ARGUMENT POINT II

The trial court, although finding that Plaintiffs sustained a loss of business and damages by reason of the criminal prosecution brought against them (R. I 46-48)

found the damages thus sustained were not chargeable against the Defendants.

In Segal vs. Horwitz Bros., supra, the facts were that Defendant, knowing certain items of personalty to be stolen, sold and delivered such items to the Plaintiff, who was entirely ignorant that the goods were stolen. Plaintiff was thereafter arrested, indicted and tried for the crime of receiving stolen property, but was acquitted of the charge. Plaintiff sued the Defendant for damages resulting from the aforesaid facts, including attorney's fees and costs incurred in defending the criminal prosecution, loss of time from his business, injury to his character and injury to his business. The case was before the court upon Plaintiff's appeal from a judgment dismissing the Plaintiff's complaint after Defendant's demurrer was sustained. The court reversed the lower court and remanded the case. In answer to Defendant's contention that the damages and expenses of the Plaintiff were not the proximate result of Defendant's sale of stolen goods to the Plaintiff, the court said—

> "If goods are sold to an innocent purchaser by one who knows them to be stolen, the vendor must be presumed to intend the natural and logical consequences of his own acts, and in our opinion, the arrest, prosecution, indictment and trial of a vendee in possession of stolen goods under such circumstances are the natural and logical consequence of the sale to such vendee of stolen goods. * * * Adopting the definition of single 'proximate cause' set out in the brief of counsel for Plaintiff in error wherein they quote from Moge v. Societe de Bienfaisance St. Jean Baptiste, 167 Mass., 298, 45 N. E., 749, 35 L. R. A., 736, that a direct and proximate cause is the active and efficient cause that sets in motion a

> train of events which brings about a result without the intervention of any force started and working actively from a new and independent source, we think the facts in the case at bar fit the definition. The sale of the stolen goods set in motion a train of events. The prosecution by the state was a logical result, and a perfectly natural result. The owner's affidavit or information to the state was but an incident, not an intervening force started and working actively from a new and independent source."

The same basic principle is announced in Friedgood vs. Kline, supra; that one who sells goods to another for resale and such other is subsequently prosecuted for unlawfully selling the same goods, is liable to the person so prosecuted for damages resulting from the prosecution.

The facts in the Friedgood case reveal that the Plaintiff, retailer, bought vinegar from the Defendant, wholesaler, and that such vinegar was allegedly pure. Plaintiff sold the vinegar and subsequently the state brought action against the Plaintiff for violation of the pure food law in selling the vinegar and fined Plaintiff $100 and $20 costs. Plaintiff sued the Defendant for damages, including the fine, the costs and attorney's fees, and the court allowed the Plaintiff recovery, saying:

> "Defendant, however, was both constructively and actually familiar with the laws of this state, and was well aware of the risk which Plaintiff innocently ran by reason of the false representations made, or implied warranty involved, in the contract of sale. Thus the fine with its attendant expenses, to which Plaintiff innocently became liable, was within Defendant's necessary contemplation."

In Abounader vs. Strahmeyer & Arpe Co., supra, Defendant, the manufacturer of canned salad oil, was held liable to the Plaintiff, a wholesaler of the same, for damages sustained by reason of a prosecution by the Department of Farms and Markets wherein Plaintiff was convicted and fined $350 for selling and exposing for sale goods which were improperly labeled as containing one quarter gallon of salad oil when in fact there was less than one quarter of a gallon of salad oil in each can. Plaintiff sued the Defendant for the fine, attorney's fees incurred in defending against the prosecution and for loss of reputation and business. The court held that the doctrine of implied warranty was applicable and affirmed the lower court's order denying Defendant's motion to dismiss the complaint, and in so holding for the Plaintiff said—

> "He would undoubtedly have the right to recover the value of the shortage. That a loss very evidently followed as a direct consequence of reliance on the false labels placed on the cans by Defendant. Had he been obligated to pay penalties or fines, recovery might be had, as that loss would quite obviously flow from the breach complained of. * * * The damages which he may recover, are such as flow directly from a breach of a duty * * *."

The case of Rossano vs. Kaminsky, supra, allowed the Plaintiff to recover damages from the Defendant who was a manufacturer of vinegar, after the Plaintiff had bought the vinegar from the Defendant and Plaintiff was subsequently prosecuted for selling the vinegar which was below the standards as set by state law. The decision of the court cited the Friedgood case as authority for their holding.

> "A manufacturer or processor of food products under modern conditions impliedly warrants his goods when dispensed in original packages or bottles and such warranty is available to all who may be damaged by their use in legitimate channels of trade, including those who purchase them for resale." (Southwest Ice and Dairy Products Company vs. Faulkenberry, supra; See also Swain vs. Schieffelin, supra; Hopkins vs. Jamrog, supra; Lawton Refining Co. vs. Hollister, supra.)

From the above authorities, it can be readily observed that when a manufacturer sells goods to another for resale or distribution, the damage sustained by the other by reason of a criminal prosecution brought against him for distributing the goods in violation of lawful requirements, are proximately caused by the manufacturer and the manufacturer is chargeable with liability for such damages.

The trial court held in its opinion (R. I 47) and its findings (R. I 40-43) that the invalidity of the ordinance under which Plaintiffs were prosecuted was fatal to Plaintiffs' case. This is the crux of this appeal. Defendants did not contend they knew in advance of the invalidity of the ordinance. They certainly knew there were other applicable laws in effect and that they were subjecting Plaintiffs to the risk of prosecution under any or all of them. Defendants had been specifically warned in this respect and wilfully persisted in their forbidden practices. The inevitable result, i.e., the prosecution of Plaintiffs promptly followed and under any accepted theory of causation was the proximate result as a matter of law. The real question is whether Defendants are to escape liability for their wrongful acts because the

authorities chose to prosecute under a particular law which then proved to have been technically defective? Plaintiffs submit that neither logic nor justice should permit this to happen. On the contrary, the Segal case referred to above is ample authority for the proposition that the lack of success of the prosecution does not relieve the wrongdoer of liability for the consequences which he was bound to anticipate.

Point III

Difficulty of ascertainment is not a bar to the recovery of damages and if the fact that damages have been sustained is established the court will adopt a method for fixing the amount.

AUTHORITIES POINT III

Blagen vs. Thompson, 23 Or. 239, 254, 31 P. 647 (1892).

Carlson vs. Steiner, 189 Or. 255, 265-266, 220 P.2d 100 (1950).

Krause vs. Bell Potato Chip Co., 149 Or. 388, 394, 39 P.2d 363 (1935).

Palmer vs. Connecticut R. & Lighting Co., 311 U.S. 554, 61 S. Ct. 379, 85 L. Ed. 336.

Mazetti vs. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

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Hopkins vs. Jamrog, Mass. 1931, 179 N.E. 224.

22 Am. Jur., Food, p. 903, Sec. 119.

Restatement of the Law of Contracts, comment, Sec. 331.

ARGUMENT POINT III

The books and records maintained by the Plaintiffs during their business operation as All-Jersey Dairy are not as complete as might be desired. However, they were as complete as might be expected in a small business operation. It can be determined from the books and other evidence that prior to the prosecution Plaintiffs had an active milk distributing business which had expanded following the commencement of business until the prosecution. Afterward there was a definite decline in the business with the ultimate result being that Plaintiffs lost the assets of their business and the earnings derived therefrom.

The fact that it may be inconvenient or difficult to establish the actual amount of damages should not wholly bar recovery.

In the case of Blagen vs. Thompson, supra, this principle is stated as follows:

> " * * * when it is certain that damages have been caused by a breach of contract and the only uncertainty is as to their amount, there can rarely be good reason for refusing on account of such uncertainty any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain * * *. *The rule that damages which are uncertain or contingent cannot be recovered, does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract but an uncertainty or contingency as to whether such gain or benefit would be derived at all.* It only applies to such damages as are not the certain result of the breach *and not to such as are*

the certain result but uncertain in amount. Now, in this case, it is certain, under the facts as he claims them to be, that the plaintiff has sustained some loss as the proximate and natural consequences of the breach of defendants, and under such circumstances the law will adopt that mode of estimating the damages which is most certain and definite, and it seems to us the rule we have suggested most nearly meets the requirements of the law." (Emphasis supplied)

Carlson vs. Steiner, supra, and Krause vs. Bell Potato Chip Co., supra, affirm the statement of the Blagen case to the effect that when some damages have been sustained as the direct and proximate result of a breach of duty, the law will adopt the mode of estimating the damages which is most certain and definite.

"The requirement of reasonable certainty does not mean that the plaintiff can recover nothing unless he establishes the total amount of his harm; nor does it mean that he cannot get damages unless he proves the exact amount of his harm. The requirement merely excludes those elements of harm that cannot be evaluated with a reasonable degree of certainty. There is usually little difficulty in proving the amount of actual expenditures, even though it may be impossible to prove the amount of expected profits. Furthermore, there are cases in which the experience of mankind is convincing that a substantial pecuniary loss has occurred, while at the same time it is of such a character that the amount in money is incapable of proof. In these cases, the defendant usually has reason to foresee this difficulty of proof and should not be allowed to profit by it. In such cases, it is reasonable to require a lesser degree of certainty as to the amount of loss, leaving a greater degree of discretion to the jury, subject to the usual supervisory power of the court." (Restatement, Law of Contracts, Comment to Section 331.)

Evidence of past profits affords a reasonable basis for the conclusion of future profits (Palmer vs. Connecticut R. and Lighting Co., supra).

The fact that damages cannot be calculated with mathematical accuracy or with absolute certainty or exactness or the fact that there is difficulty in the assessment of damages is not a sufficient reason for denying recovery thereof when the right to them is established.

> "It is the rule that loss of profits approximately resulting from the wrongful destruction of an established business constitutes an element of damages recoverable for such destruction, and it has been held that where it is apparent that some loss was suffered, it was proper to let the jury determine what the loss probably was from the best evidence the nature of the case admitted." (Southwest Ice and Dairy Products Company vs. Faulkenberry, supra.)

Hopkins vs. Jamrog, supra, states the same rule in this manner:

> "The plaintiff's loss of prospective profits if proved was not too remote to be allowed as an element of damages."
>
> "Loss of profits, injury to business reputation and loss of trade are proper elements of damages recoverable by a retailer * * * against the supplier of food upon the implied warranty of fitness where such damages are provable." (22 Am. Jur., Food, p. 903, Sec. 119, see also Mazetti vs. Armour, supra.)

The Plaintiffs produced their books and records in the trial court (R. II 186). There was sufficient evidence from which the amount of damages could have been determined under the authority cited above. That the Plaintiffs were damaged is undisputed and such dam-

ages were capable of determination with a reasonable degree of certainty from Plaintiffs' testimony and from the books and records.

Point IV

A party who commits the first breach of a contract cannot recover from the other party for a subsequent failure to perform.

AUTHORITIES POINT IV

12 Am. Jur., Contracts, Par. 338.

ARGUMENT POINT IV

The trial court allowed the Defendants to recover upon portions of their counterclaim for breach of contract by the Plaintiffs. It seems clear that if Plaintiffs' position upon this appeal is sound, then Defendants committed the first breaches and may not recover from the Plaintiffs for claimed later breaches.

Upon the premise that Plaintiffs have herein shown the Defendants to have been at fault, it is submitted that the judgment for Defendants upon their counterclaim should be reversed.

CONCLUSION

It is submitted that the Defendants herein were shown guilty of an alarming and serious disregard of their duties to the public to furnish milk of acceptable quality and to distribute milk in properly labeled and branded containers. It appears that the Defendants not only furnished milk of inferior quality and in misbranded containers but did so with knowledge of their obligations and in wilful disregard of their duty to the consuming public. As is revealed by the statement of the case, the Defendants' conduct commenced when the Oregon Milk Control Law went out of existence and the only fair inference from such fact is that as long as the regulations existing in the state of Defendants' incorporation were in effect the Defendants observed them but that when regulation in the Defendants' home state went out of existence the Defendants deliberately flouted the laws and regulations of the neighboring state.

The attitude of "the public be damned" which is implicit in the wilful acts of the Defendants makes it difficult to understand the sympathetic view toward the Defendants and the unsympathetic attitude toward Plaintiffs which was displayed by the trial court early in the case (R. II 47-48, 86-88). Perhaps the trial court regarded the occasions when the butterfat content fell below the prescribed minimums as inconsequential, or the average as being the test. If so, it was clear error, as the laws in question establish the absolute minimum below which the actual butterfat content should never fall.

The court below found in its oral opinion that the Defendants had furnished milk which was below the standards required in the Plaintiffs' distribution area, and below that required by the contract, and that the Plaintiffs suffered a loss of business and were damaged by reason of the prosecution by the Cowlitz County authorities. It appears that the court therefore found all essential facts necessary to Plaintiffs' recovery, but did not allow Plaintiffs' recovery by reason of the mistaken view as to the law as has been shown above.

The Plaintiffs seek by this appeal to obtain a reversal of the judgment below and the award of such damages to the Plaintiffs as seems correct and proper under the evidence relating thereto. The Plaintiffs further suggest that if the evidence as to the amount of damages is not sufficient, the case be remanded for the taking of further evidence on this subject.

Respectfully submitted,

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